



CITY OF LODI

COUNCIL COMMUNICATION

AGENDA TITLE: Request by Fosen Interiors, 120 North School Street, for an Encroachment Permit to Place Patio Furniture in Front of Its Store

MEETING DATE: October 19, 1994

PREPARED BY: Public Works Director

RECOMMENDED ACTION: That the City Council discuss and take appropriate action.

BACKGROUND INFORMATION: Mr. Eric Fosen, Fosen Interiors, has requested (under the attached letter dated September 22, 1994) that the City issue an encroachment permit allowing furniture to be displayed on the sidewalk at 120 North School Street. The request is being made to bring Fosen Interiors into compliance with Chapter 12.04 of the Lodi Municipal Code. Mr. Fosen has indicated that displaying his merchandise on the sidewalk helps create a more colorful, exciting and interesting Downtown and that it lets the public know his store is open.

The subject of sidewalk displays and sale of merchandise within the right of way has been before the City Council on numerous occasions. In 1988, the City Council approved the only encroachments within the City for storing merchandise on the sidewalk. These were fronting Reo's Appliance and Kundert & Bauer Appliance on Oak Street. Since these stores had no back entrance, and they had been using the public right of way since their opening, Council allowed the storage of newly-delivered and trade-in appliances on the sidewalk immediately adjacent to their building face during working hours only. Since the late 1980's, our Department has been consistent in not allowing the display of merchandise on public sidewalks, or in the public right of way, under an encroachment permit. The only exceptions to this are the appliance stores on Oak Street and the special Downtown sidewalk sales sponsored by the Lodi Downtown Business Association (LDBA).

In 1990, there was a request from a few specific businesses in the Downtown area that they also be allowed to place sales merchandise on the sidewalk fronting their establishments. The City Attorney, under his memo of July 19, 1990 (copy attached), provided the City Council with research and an opinion on sidewalk display of merchandise. The City Attorney and I met with the LDBA in August 1990 and the attached memo from the City Attorney, dated August 29, 1990, recaps that meeting. The City Council asked the LDBA to provide them with a recommendation. On July 20, 1992, the City Attorney wrote the attached letter to the LDBA confirming that it was the consensus of the LDBA members that sidewalk displays should not be permitted and that violators would be cited.

Staff contacted Michael Freedman (Freedman Tung & Bottomley) to discuss the issue of sidewalk encroachments. It is Mr. Freedman's opinion that the City should, upon adopting the Central City Master Plan, allow tables, chairs, and umbrellas on sidewalks for restaurants, cafes, and other eateries in the Downtown area without requiring City Council concurrence on every request. He is advocating that the Downtown needs more outdoor dining and that the City should make it easier and less prohibitive to induce such an atmosphere Downtown by allowing sidewalk amenities, such as tables,

APPROVED

THOMAS A. PETERSON
City Manager



recycled paper

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chairs, and A-frame signs. However, Mr. Freedman has indicated that in such a situation as Fosen Interiors, where it is simply merchandise on the sidewalk and not for an eatery, the City Council should continue to review these types of encroachment permits.

Because Fosen Interiors is so far north of the "Downtown core" area, Mr. Freedman believes that displaying their patio furniture on the sidewalk will not be detrimental to the Downtown revitalization effort and could, in fact, have a positive effect on North School Street.

The appeal procedure in the ordinance is as follows:

12.04.100 Refusal—Appeal.

- A. Any person aggrieved by the refusal of a permit required by this article may appeal to the city council. Administration of this chapter is referred to the director of the city.
- B. If the city council finds all of the following to be true, the permit shall be granted:
 1. The applicant will be substantially damaged by the refusal to grant the permit as requested.
 2. No other reasonable method of obtaining the desired result is available except as proposed by the applicant.
 3. The granting of the permit will not be materially detrimental to the public interest, safety, health and welfare or injurious to other property. (Prior code §9A-10)

If the City Council desires to instruct our Department to issue an encroachment permit for the placement of merchandise fronting Fosen Interiors, it is suggested that the encroachment permit be issued with the following conditions:

1. Encroachment shall be limited to the sidewalk right of way fronting 120 North School Street (Fosen Interiors).
2. Encroachment permitted during business hours only.
3. A minimum of 7 feet of unobstructed width shall be provided on the sidewalk for pedestrian traffic (sidewalk is approximately 12 feet wide).
4. Encroachment shall not obstruct store entry or impede traveling public.
5. Permittee shall maintain right of way in a clean and neat manner.

Our Department is experiencing a Citywide increase in unapproved right-of-way encroachments related to advertising signs and the sale of merchandise. This is to inform the Council that staff will be working with Michael Freedman to develop more generic guidelines for sidewalk and right-of-way encroachments in the Downtown and Cherokee revitalization areas in order that certain encroachment permits can be issued over the counter without Council approval. In the near future, we will be developing and reviewing, with the Council, criteria for A-frame signs. The one item that is not permitted now, and based on discussions with Michael Freedman will not be allowed in the future, is the sale of automobiles from the street right of way or landscaped parkways or sidewalk areas.

FUNDING: Not applicable.


Jack L. Ronsko
Public Works Director

Attachments

cc: City Attorney
Street Superintendent
Economic Development Coordinator
Associate Civil Engineer - Development Services
Fosen Interiors



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24 SEP 33 PM 12:33

September 22, 1994

Lodi City Council
PO Box 3006
Lodi, CA 95241-1910

Dear Sirs:

I have been put on notice that I am in violation of Chapter 12.04 of the Lodi Municipal Code (impeding the sidewalk).

In telephone conversations with Mr. Bradley and Mr. Ronsko of the city staff, it was suggested I appeal to the City Council.

I am requesting a permanent encroachment permit to place patio furniture in front of my store.

I have been doing this for the past two years with no negative reaction or input from anyone.

I have to use shades in my west facing windows, this tends to make my store look closed. The furniture outside lets people know I'm open.

Current laws regarding merchandise on the sidewalk will be changed soon as per adamant suggestions by the downtown revitalization expert, Michael Freedman.

This practice helps my store and also helps create a more exciting, interesting and colorful downtown.

Please contact me with your affirmative answer as soon as possible.

Sincerely,

Eric R. Fosen
Fosen Interiors

MEMORANDUM

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To: Honorable Mayor and Council Members

From: Bob McNatt, City Attorney

Date: July 19, 1990

Subj: SIDEWALK DISPLAY OF MERCHANDISE

ISSUE

In recent weeks, the issue of using downtown sidewalks for display of merchandise by adjoining businesses has been discussed. As directed, I have now had the opportunity to research the topic and offer the following:

ANALYSIS

As a starting point, I inquired at the last meeting of the Central Valley City Attorney's Association, as to how many cities allowed regular use of sidewalks for display of merchandise by adjoining businesses. None of the cities present allowed this on a regular basis, but a few admitted enforcement is not vigorous. All appear to allow it on an occasional basis such as special "Downtown Days" sales as long as special permits are obtained.

From a legal standpoint, the research results were mixed. It appears the City can allow such uses if desired, but cannot be compelled to do so. This seems to reduce the issue to one of aesthetics versus business considerations. In beginning, it is noted that some states have taken the position that cities have no express authority to allow, by lease or permit, use of part of the sidewalk for commercial uses such as news stands, etc. (McQuillan Municipal Corporations §30.101). As close a case as I found on this point in California was Loska v. Superior Court 233 Cal.Rptr. 213 which held that use of a public right of way for private enterprises "... is a special privilege ... which may be ... entirely withheld." This implies authority for cities to allow such uses if desired, but is not a clear recognition of that right.

That conclusion is consistent with cases from other states such as Klieber v. City of Idaho Falls 716 P.2d 1273 which held that there is no inherent right to use a public sidewalk as a place of business.

On a related note, the California courts of appeal have endorsed the "reasonable and temporary" use of a sidewalk for delivering or receiving goods, based on custom or necessity (Arques v. Sausalito 272 P.2d 58). While this would cover our situation in which an appliance store with no back door was given specific consent to use the sidewalk for drop off and pickup of refrigerators and other large appliances, it is not an all encompassing grant of authority.

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Honorable Mayor and Council Members
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Research also confirmed my original suspicion that the City could be liable for injuries to third parties caused by the display of merchandise on a sidewalk. It was clearly held in Wise v. Maxwell Hardware 271 P. 918 that an abutting business was liable for injuries due to goods on a sidewalk. In addition, the placing of an obstruction on a sidewalk by an adjoining business, with the city's consent or knowledge, may result in joint liability for both the city and the business if a passerby is injured (San Francisco v. Ho Sing 330 P.2d 802).

CONCLUSION

Apparently, no other city in this region customarily allows such displays. It is my belief that the Council may, but cannot be compelled to allow use of the sidewalk for merchandise displays. If it does so, the City could be jointly liable for injuries to third parties caused by any such displays. Of course, such potential liability could be covered by insurance required by the City as a condition of allowing this type of use.

Respectfully submitted,



Bob McNatt
City Attorney

BM:vc

MEMORANDUM

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To: Honorable Mayor and Council Members
From: Bob McNatt, City Attorney
Date: August 29, 1990
Subj: SIDEWALK DISPLAY/SALES OF MERCHANDISE

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SITUATION

On August 22, 1990, a meeting was held between representatives of the Lodi Downtown Business Association (LDBA), Public Works Director Jack Ronsko, and myself to discuss recent concerns expressed over display of merchandise on public sidewalks in the downtown area (see Memo to Council dated July 19, 1990).

From that meeting, three possible courses of action for the City emerged:

1. Make no changes in the Municipal Code. This would mean that under the City ordinances as they now exist, no merchandise could be displayed for sale on the sidewalks. This would be the easiest to administer, but may not be desirable from the Council's point of view.
2. Allow business operators to lease space on the sidewalk if the width of the sidewalk allows. It was discussed that the average sidewalk needed to be only about 8 feet wide for safe passage of pedestrians. Any excess could be used for other purposes.

Whether this can be done is still not clear since no cases were found involving the same situation. A few cases were found which were somewhat similar, but the rulings don't answer our questions completely.

Some seem to allow use of the sidewalk for business (Loska v. Superior Court 233 Cal.Rptr.213), but these usually involve temporary and transient uses such as ticket sales. On the other hand, it has been held that cities have no express authority by lease or permit to use part of the sidewalk for commercial uses such as newsstands (McQuillan Municipal Corporations Section 30.101). It has been further held that a City cannot, for example, allow or authorize the maintenance of a lunch wagon at a fixed place on a public right of way (Strong v. Sullivan 180 Cal.331).

If there is a distinction between these lines of cases, it seems to be that permanent uses are not allowed while those which are occasional and in which the seller moves from place to place, may be all right.

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Even assuming that leases of sidewalk space are legal, constitutional requirements of equal protection would require that the City offer available space to any interested party, not just to adjacent property owners or businesses. In a "worst case scenario", a sidewalk flea market might result.

If this option was chosen, no guarantee can be made that it could be upheld if challenged. From a practical standpoint, it would also require substantial staff time to administer leases, review insurance certificates, make determinations if some sidewalk widths were adequate, etc.

3. Amend zoning regulations to allow display and sale of merchandise on downtown sidewalks.

From a legal standpoint this may be the easier to do than grant leases. I believe a zone allowing this could be designated using the boundaries of the downtown area. There appear to be valid reasons to do so. For example, the downtown area has no setbacks in which merchandise could be displayed such as that found in other commercial areas along Kettleman Lane, Cherokee Lane, and other major streets.

There may be other problems with this approach, however. Provisions of the Municipal Code such as Sections 9.18.010 and 10.44.080 have been adopted to regulate sales of merchandise from public sidewalks. These statutes would be affected if it was decided to allow sale or display of merchandise on sidewalks in the downtown area.

I assume these ordinances were originally adopted to deal with itinerant sales people who might cause traffic problems, obstruct the sidewalk from pedestrian movement, or otherwise become nuisances. If sidewalk display or sale of goods is to be allowed by downtown businesses, then these itinerant vendors must, by law, be treated the same, although they could be restricted to the newly created zone.

While cities can regulate sidewalk selling (re Gilstrap 171 Cal. 108), the law requires all persons similarly situated to be treated alike, unless there is some legitimate purpose for differential treatment (16 Am Jur 2d, Constitutional Law Sec. 387). A law which makes a distinction between transients and permanent local merchants for the purpose of protecting such local merchants is probably invalid (State v. Conlon 33 A. 519). The U. S. Supreme Court has said that a regulation of peddlers which exempts local residents will be overturned (Machine Co. v. Gage 100 U. S. 676).

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MEMO TO COUNCIL
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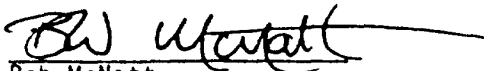
What this all means is simply that if businesses are going to be allowed to use the downtown sidewalks for display or sale of merchandise, the City probably has to allow similar uses by those selling flowers, tee shirts, pictures or other goods on a downtown sidewalk, even if they do not have a permanent place of business in the City.

SUMMARY

If the Council desires to change the Municipal Code and allow use of the sidewalks for display or sale purposes, it might be possible to accomplish this by either lease of excess right of way on the sidewalk to the adjacent property, or by amending the Zoning Code. Both of these approaches carry with them some risks or potential legal problems as discussed above.

Under present ordinances, such uses are absolutely prohibited. If the downtown merchants were allowed to continue these practices without modifying the Municipal Code, we might not be able to enforce our other sidewalk sales ordinances against (for example) flower sellers, or tee shirt vendors along Kettleman or Cherokee Lanes, since that would be differential treatment.

Respectfully submitted,


Bob McNatt
City Attorney

BM:vc

cc: Lodi Downtown Business Assn.
Jack Ronsko, Public Works Dir.
Jim Schroeder, Community Development Dir.

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SIDEWALK.11/TXTA.01V

CITY COUNCIL

JAMES W. PINKERTON, Mayor

PHILLIP A. PENNINO

Mayor Pro Tempore

DAVID M. HINCHMAN

JACK A. SIEGLOCK

JOHN R. (Randy) SNIDER

July 20, 1992

3:00 PM
CITY OF LODI

CITY HALL, 221 WEST PINE STREET

P.O. BOX 3006

LODI, CALIFORNIA 95241-1910

(209) 334-5634

FAX (209) 333-6795

Street Sidewalk
THOMAS A. PETERSON

City Manager

ALICE M. REIMCHE

City Clerk

BOB McNATT

City Attorney

Lodi Downtown Business Association
Attention: John Borelli, President
c/o Borelli Jewelers
9 North School Street
Lodi, CA 95240

SUBJECT: DOWNTOWN SIDEWALK DISPLAYS

Ladies and Gentlemen:

It has been called to my attention that the City has again received reports about merchandise being displayed on downtown sidewalks by some businesses. While there are mixed emotions in the community and City government on this practice, the fact remains that such sidewalk displays violate Lodi Municipal Code Chapter 12.04. Unless and until this ordinance is changed, the City is obligated to take some action on these violations when they are called to our attention.

The issue was recently presented to the LDBA for response. I believe it was the consensus of the organization's members that sidewalk displays should not be permitted. The City Council accepted this position and took no further action to modify the ordinance.

It is not my desire to see downtown merchants cited for this violation. However, I also do not feel City staff is free to choose which ordinances it will or will not enforce. Therefore, by copy of this letter, I am advising affected organizations and persons that unless the City Council directs that this matter be placed on an upcoming agenda to consider modifying the ordinance, we will have no option but to begin citing violators.

Your input is requested.

Sincerely,

Bob McNatt

BOB W. McNATT

City Attorney

BM:vc

cc: Lodi City Council
Henderson Bros. Co., Inc.
Wright Motors
Gundershaug Electric Co.
Jack Ronsko, Public Works Director
Glen Baltzer, Street Superintendent
Lt. Charles Mauch, Lodi Police Dept.

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JUL 22 1992



CITY OF LODI

MUNICIPAL SERVICE CENTER

CITY COUNCIL

JACK A. SIEGLOCK, Mayor
STEPHEN J. MANN
Mayor Pro Tempore
RAY G. DAVENPORT
PHILLIP A. PENNINO
JOHN R. (Randy) SNIDER

CITY OF LODI

CITY HALL, 221 WEST PINE STREET
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THOMAS A. PETERSON
City Manager
JENNIFER M. PERRIN
City Clerk
BOB McNATT
City Attorney

October 13, 1994

Fosen Interiors
Attn: Eric R. Fosen
120 North School Street
Lodi, CA 95240

SUBJECT: Request by Fosen Interiors, 120 North School Street, for an
Encroachment Permit to Place Patio Furniture in Front of Its Store

Enclosed is a copy of background information on an item on the City Council agenda of
Wednesday, October 19, 1994, at 7 p.m. The meeting will be held in the City Council
Chamber, Carnegie Forum, 305 West Pine Street.

This item is on the regular calendar for Council discussion. You are welcome to attend.

If you wish to write to the City Council, please address your letter to City Council, City of Lodi,
P. O. Box 3006, Lodi, California, 95241-1910. Be sure to allow time for the mail. Or, you may
hand-deliver the letter to City Hall, 221 West Pine Street.

If you wish to address the Council at the Council meeting, be sure to fill out a speaker's card
(available at the Carnegie Forum immediately prior to the start of the meeting) and give it to
the City Clerk. If you have any questions about communicating with the Council, please
contact Jennifer Perrin, City Clerk, at (209) 333-6702.

If you have any questions about the item itself, please call me at (209) 333-6706.



Jack L. Ronsko
Public Works Director

JLR/lm

Enclosure

cc: City Clerk